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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 394

HERMAN DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 99-101;[1] Pet. App. 1A-3A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957 (R. 102; Pet. App. 4A). A petition for rehearing was denied on July 23, 1957 (R. 103; Pet. App. 5A). The petition for a writ of certiorari was filed on August 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the printed Appellant's Appendix in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether there was probable cause for government agents to search petitioner's automobile without a warrant.

2. Whether there was a presumption that certain evidence (shopping bags and jugs), if produced, would have been unfavorable to the government, where such evidence had been destroyed in accordance with a custom of retaining only necessary samples of illicit alcohol.

STATEMENT

Petitioner was charged in a two-count indictment in the United States District Court for the Northern District of Illinois with unlawful possession of five gallons of tax unpaid distilled spirits in violation of 26 U.S.C. 2803(a), and with unlawful concealment of these spirits with intent to defraud the United States of the tax thereon in violation of 26 U.S.C. 3321(a) (R. 10). At a trial before the court without a jury, petitioner was found guilty (R. 24, 30). He was sentenced to imprisonment for two years (R. 88). On appeal (R. 91), the conviction was affirmed, one judge dissenting (R. 99-102; Pet. App. 1A-4A).

Prior to the trial, petitioner filed a petition to suppress as evidence five gallons of alcohol, five glass jugs, and two shopping bags which government agents had seized in petitioner's automobile on November 20, 1953 (R. 12-14). Subsequent to a hearing on the motion (R. 31-87), the court in a memorandum

opinion denied the motion to suppress (R. 22-24). At the trial, it was stipulated that the evidence presented at the suppression hearing should be submitted to the court "on the question of the guilt or innocence of the defendant" (R. 24, 26, 29).

Evidence adduced at the suppression hearing may be summarized as follows:

Petitioner was being investigated as a liquor law violator by government agents Hambach, Rosgboro, and Fletcher (R. 42, 62, 72). About November 1, 1953, Hambach was told by a reliable informer named Willie Jones, whose information Hambach had used on previous occasions, that petitioner had been delivering alcohol to 4502 Vincennes Avenue in Chicago (R. 59). This address was known to the agents as that of John Binyon, known as "Big John", who operated a speakeasy where illicit alcohol had been seized several times (R. 49, 59, 66, 80). Hambach knew that petitioner had been arrested several times, and had once been convicted for unlawful possession of alcohol (R. 47). See *United States* v. *David*, 107 F. 2d 519 (C.A. 7).

On November 6, 1953, agent Hambach followed petitioner in a Packard sedan from petitioner's home in Dolton, Illinois, to 45th and South Park Avenue in Chicago. By car radio, Hambach gave the license number of the Packard to agent Fletcher to take over the pursuit (R. 44-45). Fletcher saw petitioner park near 4502 Vincennes Avenue, wait about five minutes, remove two shopping bags from the rear of the car, and take them into the building at this address. Upon leaving about ten minutes later, peti-

tioner was seen carrying two empty shopping bags (R. 73-74).

According to testimony of the government agents, on November 20, 1953, petitioner parked his Packard near 4502 Vincennes Avenue (R. 55, 56, 64, 75). Agent Roseboro walked to the driver's side of petitioner's car, showed his credentials as a federal officer, asked what was in the car, and received petitioner's reply, "Nothing" (R. 56-57, 64). Roseboro looked in the back of the car on the floor and saw two shopping bags and the necks of what appeared to be one-gallon jugs (R. 64, 66). When Hambach pulled up in another automobile, he alighted and saw in the back of petitioner's car a shopping bag with three one-gallon jugs containing a colorless liquid (R. 46, 50, 56-57, 58, 59).[2] Roseboro then searched the car, and tasted and smelled the alcohol in the jugs, which were without Internal Revenue stamps. After Roseboro stated that the liquid was whisky, Hambach arrested petitioner, and seized the two shopping bags and five one-gallon jugs (R. 46, 65, 75-76). The agents did not have a search warrant or a warrant for petitioner's arrest (R. 34, 55). Petitioner told Hambach that he had been in financial difficulty, and had been buying moonshine for $6.00 and selling it for $7.00 per gallon (R. 47).

Petitioner's testimony as to what occurred on No-

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[2] The agents estimated the height of the bags as between 12 and 24 inches, and the height of the jugs as between 10 and 12 inches (R. 58, 68). Petitioner testified that the jugs were about 11 inches high, and that the tops of the bags were about 8 or 10 inches above the tops of the jugs (R. 35).

vember 20, 1953, conflicted with that of the agents. His version was that Roseboro placed him under arrest before, not after, the search of the car (R. 34). He stated that the necks of the jugs were not visible to a person looking into the car, since the tops of the bags were about 8 inches above the tops of the jugs, which were covered with paper (R. 35).

After petitioner's arrest, agent Fletcher, using a pint bottle, took a composite sample from each of the five jugs, which he delivered to the government chemist for analysis (R. 76). The admission that the jugs contained alcohol was made in petitioner's testimony on the motion to suppress, and by stipulation between counsel (R. 35, 29). Later, the shopping bags and jugs were destroyed, but samples of the alcohol were retained. This was in accordance with the custom of the Alcohol and Tobacco Tax Unit to keep only alcoholic samples and to destroy the containers unless needed for a particular evidentiary purpose, such as that of showing fingerprints (R. 50-51, 67).

ARGUMENT

1. Petitioner's principal contention is that there was an unlawful search and seizure of the illicit alcohol from his automobile (Pet. 13-23). There was, however, probable cause for the search and seizure without a warrant. There were facts and circumstances within the government agents' knowledge, and of which they had reasonably trustworthy information, which were sufficient to warrant a belief by them as men of reasonable caution that a crime

was being committed. Cf. *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132; *Husty* v. *United States*, 282 U.S. 694; *United States* v. *One 1946 Plymouth Sedan Automobile*, 167 F. 2d 3, 7-8 (C.A. 7); *United States* v. *O'Brien*, 174 F. 2d 341, 345-346 (C.A. 7); *Cassidy* v. *United States*, 49 F. 2d 504 (C.A. D.C.).

Salient facts and circumstances viewed as a composite picture disclose probable cause, making the search and seizure here reasonable. These include knowledge by the agents of petitioner's previous arrests and conviction for unlawful possession of alcohol; reliable information from a previously tested informer that petitioner had been delivering alcohol at a known speakeasy where successful raids had been made; surveillance of petitioner on one occasion when he surreptitiously took two loaded shopping bags into the speakeasy, and then emerged with empty bags; and knowledge by the agents from their sense of sight that the shopping bags in petitioner's automibile parked near the speakeasy contained jugs with a liquid which was probably alcohol.

There is no conflict in decisions to warrant certiorari (see Pet. 18-21). Unlike the situation here where petitioner parked his car before the agents approached, in *Clay* v. *United States*, 239 F. 2d 196, 200 (C.A. 5), a "citizen was forceably run down and driven off the highway", and in *Emite* v. *United States*, 15 F. 2d 623 (C.A. 5), an agent followed the defendant's car 10 miles and stopped it. Other features distinguishing *Emite* from the instant case are the fact that there the agent did not see or smell

liquor until after he had opened the door of the automobile, and the informer was "unidentified". *Brown v. United States*, 4 F. 2d 246 (C.A. 9), does not involve the search of an automobile, but rather an illegal arrest made upon mere suspicion. The quoted language in *Wisniewski v. United States*, 47 F. 2d 825 (C.A. 6), is dictum, and defendant's conviction there was affirmed.[3]

2. Petitioner argues that, since the government agents destroyed the shopping bags and one-gallon jugs, the court below should have found that there was a presumption that, if such evidence had been produced, it would have been unfavorable to the government and favorable to petitioner (Pet. 3, 23-24). Petitioner asserts that production of this evidence would have shown that the jugs when placed in the bags would not have been visible to one looking into the automobile (see R. 35).

This contention overlooks government testimony as to the custom of the Alcohol and Tobacco Tax Unit to retain only alcoholic samples, and to destroy the containers unless needed for an anticipated evidentiary purpose (R. 51). There is no showing that the property was destroyed in anticipation of litigation for the purpose of wrongful suppression. The explanation of

[3] We agree with petitioner (Pet. 15) that *United States v. Walker* (C.A. 7), decided June 10, 1957 (Pet. App. 6A-23A), involves primarily a lawful arrest made prior to the search, which was held valid as incidental to the arrest; whereas in the instant case, the search preceded the arrest. While the court below refers to *Walker*, it does not treat that case as directly in point on its facts, but merely as enunciating some general principles applicable.

its destruction was reasonable and satisfactory so as to eliminate a possible unfavorable presumption against the government arising from its non-production. Cf. *Mastin* v. *Noble*, 157 Fed. 506, 513 (C.A. 8); *McDonald* v. *United States*, 89 F. 2d 128, 137, 138 (C.A. 8), certiorari denied, 301 U.S. 697; Wigmore on *Evidence*, 3d ed., Sec. 290 (3).

Since the agents were standing on the street and looking downward at the bags, it was reasonable for the court to believe that they could see the necks of the jugs through the tops of the open bags, even though the jugs were admittedly not as tall as the bags. The court was not required to accept petitioner's testimony that there was paper on top of the jugs in the bag. The court was thus at liberty to find credible, as it did, the testimony of the agents that the "necks of the jugs and their colorless fluid contents were clearly visible to them when they looked through the windows of the automobile" (R. 23).

CONCLUSION

The case was decided in accordance with established legal principles, and there is no conflict in decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1957.